

Hon. Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LAUREL PARK COMMUNITY, LLC, a
Washington limited liability company;
TUMWATER ESTATES INVESTORS, a
California limited partnership; VELKOMMEN
MOBILE PARK, LLC, a Washington limited
liability company; and MANUFACTURED
HOUSING COMMUNITIES OF
WASHINGTON, a Washington non-profit
corporation,

Plaintiffs,

vs.

CITY OF TUMWATER, a municipal
corporation,

Defendant.

NO. C09-5312 BHS

**SUPPLEMENTAL DECLARATION OF
JEFFREY S. MYERS IN SUPPORT OF
AMENDED MOTION FOR SUMMARY
JUDGMENT**

PURSUANT TO 28 U.S.C. § 1746, Jeffrey S. Myers, hereby declares as follows:

1. I am the attorney for the defendant City of Tumwater in the above entitled matter. I am over the age of 18, competent to be a witness and make this declaration on personal knowledge.

2. I was an attorney for the City of Tumwater in proceedings before the Western Washington Growth Management Hearings Board which challenged the MHP Zoning Ordinances that are the subject of this litigation. The challenges were brought by the Manufactured Housing Communities of Washington, Laurel Park and Tumwater Estates Mobile Home Parks, plaintiffs in this action.

1 3. The Final Decision and Orders of the Western Washington Growth Management
2 Hearings Board discussed in paragraph 12 of the Declaration of Michael Matlock were appealed to
3 the Thurston County Superior Court in late 2009 and early 2010. The Superior Court reviewed the
4 administrative record and on September 17, 2010 issued an Order Upholding Board Decisions. A
5 true and correct copy of the Court's September 17, 2010 Order is attached hereto as **Exhibit 1**.

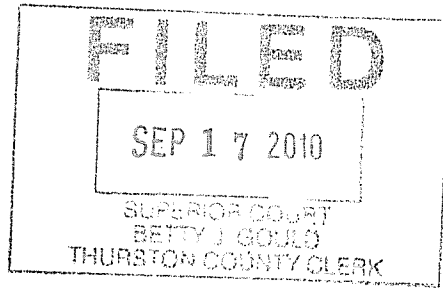
6 I declare under penalty of perjury under the laws of the state of Washington and the United
7 States of America that the foregoing is true and correct.

8 DATED this 4th day of March, 2011, at Tumwater, Washington.

9
10 LAW, LYMAN, DANIEL,
 KAMERRER & BOGDANOVICH, P.S.

11
12 
 Jeffrey S. Myers WSBA #16390

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THE HONORABLE THOMAS MCPHEE

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

LAUREL PARK COMMUNITY, LLC, a
Washington limited liability company;
MANUFACTURED HOUSING
COMMUNITIES OF WASHINGTON, a
Washington nonprofit corporation; and
TUMWATER ESTATES INVESTORS, a
California Limited Partnership

Petitioners,

vs.

CITY OF TUMWATER, a Washington
municipal corporation; and, WESTERN
WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, a Washington State
agency,

Respondents.

NO. 09-2-02687-1

**ORDER UPHOLDING BOARD
DECISIONS**

Clerk's Action Required

THIS MATTER came before this Court on Petitioners' consolidated petitions for review of the Growth Management Hearings Board Final Decision and Order (October 13, 2009); Order on Petitioners' and City's Motions for Reconsideration (November 12, 2009), and Compliance

ORDER - 1

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

1 Order (March 25, 2010).¹ The Court considered the parties' pleadings and documents filed
2 herein, including Petitioners' Opening Appeal Brief, City of Tumwater's Responding Brief,
3 Petitioners's Reply Brief, and the Certified Record; and the Court having deemed itself fully
4 apprised; now, therefor:

5 IT IS HEREBY ORDERED that the Petitioners' Petitions for Review are denied. The
6 Growth Management Hearings Board Final Decision and Order (October 13, 2009), Order on
7 Petitioners' and City's Motions for Reconsideration (November 12, 2009), and Compliance
8 Order, are upheld for the reasons set forth in the court's oral opinion, a transcript of which is
9 attached as Exhibit A.
10

11 DONE IN OPEN COURT this 17th day of September, 2010.

12 THOMAS McPHEE

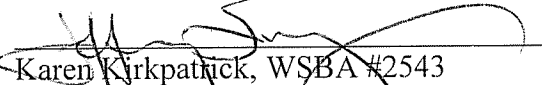
13
14 Honorable Judge Thomas McPhee

15 Presented by:

16 TUMWATER CITY ATTORNEY
17 KAREN KIRKPATRICK

18 LAW OFFICES OF
19 SUSAN ELIZABETH DRUMMOND

20 LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.

21 
22 Karen Kirkpatrick, WSBA #2543
23 Susan Elizabeth Drummond, WSBA #30689
24 Jeffrey S. Myers, WSBA #16390
25 Attorneys for City of Tumwater
26

¹ Petitioners filed three petitions, titled: (1) Petition for Review of Final Decision and Order of Western Washington Growth Management Hearings Board; (2) Petition for Review of Western Washington Growth Management Hearings Board's Order on Motions for Reconsideration; and (3) Petition for Review of Compliance Order of the Western Washington Growth Management Hearings Board. The Court consolidated the three petitions under a single cause number.

1 Approved as to Form,
2 Notice of Presentation Waived:

3 SHORT CRESSMAN & BURGESS PLLC

4 *WSBA 16390*
5 *[Signature]* / *per e-mail authorization*
6 Scott M. Missall, WSBA #14465
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8 Attorneys for Petitioners

9 LAW OFFICE OF BILL CLARKE

10 *WSBA 16390*
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12 Bill Clarke, WSBA #28800
13 Attorneys for Petitioners

14 ATTORNEY GENERAL'S OFFICE

15 *WSBA 16390*
16 *[Signature]* / *per e-mail authorization*
17 Gerald R. Anderson, WSBA #8734
18 Attorneys for Western Washington
19 Growth Management Hearings Board
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ORDER - 3

LAW OFFICES OF
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

LAUREL PARK COMMUNITY, LLC., a
Washington limited liability
company; MANUFACTURED HOUSING
COMMUNITIES OF WASHINGTON, a
Washington nonprofit corporation;
corporation; and TUMWATER ESTATES
INVESTORS, a California Limited
Partnership,

Petitioner,

vs.

CITY OF TUMWATER, a Washington
municipal corporation; and WESTERN
WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, an agency of the
State of Washington,

Respondents.

No. 09-2-02687-1

ORAL OPINION

BE IT REMEMBERED that on the 7th day of September, 2010,
the above-entitled and numbered cause came on for hearing
before the Honorable Thomas McPhee, Judge, Thurston County
Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
Thurston County Superior Court
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 754-4370

EXHIBIT

A

A P P E A R A N C E S

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1 September 7, 2010 Olympia, Washington

2 AFTERNOON SESSION

3 Department 2 Hon. Thomas McPhee, Presiding

4 (Appearances as heretofore noted.)

5 Kathryn A. Beehler, Official Reporter

6 --o0o--

7 THE COURT: Please be seated. Good
8 afternoon, Counsel.

9 MS. DRUMMOND: Good afternoon.

10 MR. MYERS: Good afternoon.

11 MR. MISSALL: Hello, Your Honor.

12 THE COURT: Who is on the phone?

13 MS. DRUMMOND: Susan Drummond for the
14 city of Tumwater.

15 MR. MISSALL: And Scott Missall on
16 behalf of the petitioners.

17 THE COURT: Good afternoon, Counsel.
18 Present in the courtroom are Mr. Myers and
19 Ms. Fitzpatrick; right?

20 MS. KIRKPATRICK: Kirkpatrick.

21 THE COURT: For the city, as well.

22 Ladies and gentlemen, here is the decision
23 that I have reached in this case. In my decision
24 I will, on occasion, address the actions of the
25 Tumwater Planning Commission, which I describe

1 as "the commission," the Tumwater City Council,
2 which I describe as "the council" and the Western
3 Washington Growth Management Hearings Board which
4 I describe as "the board."

5 In this appeal the petitioners request that
6 the court overturn the board and declare two city
7 of Tumwater ordinances invalid. This case is
8 before the court for review of the board's action.
9 Here a superior court is asked to exercise its
10 appellate jurisdiction in conducting that review.
11 An undercurrent that runs throughout the city's
12 deliberative process and action is the contention
13 of at least some petitioners that the ordinances
14 constitute an unconstitutional taking of
15 petitioners' property. The board does not have
16 jurisdiction to decide that issue. It is not part
17 of the board's decision here and not part of this
18 court's review. There may be a companion case
19 seeking judicial determination that the ordinances
20 constitute an unconstitutional taking of
21 petitioners' property, but that invokes the
22 superior court's original jurisdiction and is
23 different than the jurisdiction exercised here.
24 The two jurisdictions will not be combined.

25 Ladies and gentlemen, I'm going to leave

1 the bench for just a moment to get a different
2 pair of glasses that will make it easier for me to
3 read my notes. I'll be back in just a moment.

4 (A recess was taken.)

5 THE COURT: Please be seated. This
6 court's appellate jurisdiction to review the
7 board's decision is a limited power. I cannot
8 substitute my judgment for that of the board or
9 the city. My review powers are defined and
10 limited by RCW 34.05.570(3).

11 Petitioners' appeal focuses on Goal 6 of
12 the Growth Management Act, codified at RCW
13 36.70A.020(6), in two broad areas. In the first
14 area petitioners contend that the ordinances must
15 be declared invalid because they were enacted in
16 violation of the takings prong of Goal 6.
17 Petitioners contend that the ordinances were
18 enacted without compliance with RCW 36.70A.370, a
19 required procedure for the takings prong of
20 Goal 6. As a consequence, petitioners contend the
21 board erred in holding the ordinances valid,
22 subject to compliance with section .370. Further,
23 they contend the board erred in approving the
24 compliance process. Finally, they contend the
25 board erred in permitting compliance with

1 section .370 without also requiring that the city
2 undertake reconsideration and reenactment of the
3 ordinances. I conclude that no error has been
4 demonstrated.

5 When the board rejected appeal of the
6 ordinances in the Final Decision and Order, it
7 concluded that the city had adequately considered
8 the takings prong of Goal 6. The board cited to
9 Exhibits 31, 75, and 95 of the record in
10 supporting this decision. In the Reconsideration
11 Order where the board acknowledged the
12 inconsistency of its findings that the city had
13 adequately considered the takings prong of Goal 6
14 and that the city had failed to demonstrate
15 compliance with section .370, the board directed
16 compliance with section .370 but declined
17 petitioners' request that it declare the
18 ordinances invalid. No error has been shown here.

19 RCW 36.70A.300(4) and .302 specifically
20 address the invalidity of an ordinance where
21 noncompliance with the GMA is found by the board.
22 A determination of invalidity is a discretionary
23 decision reserved to the board under section .302.
24 I conclude that review of such a discretionary
25 decision would be reviewed under the arbitrary and

1 capricious standard.

2 As exercised here, the decision of the
3 board to find noncompliance but reject
4 petitioners' request that the ordinances be
5 declared invalid cannot be found arbitrary and
6 capricious. The record here establishes that the
7 city failed to demonstrate compliance with
8 section .370 at the first hearing before the
9 board. The board then rejected the city's request
10 to supplement the record on reconsideration to
11 show initial compliance with section .370. That
12 decision by the board to not allow supplementation
13 was based upon a hearing procedures rule of the
14 board, not on any provision of the Growth
15 Management Act. Instead, the board opted for a
16 compliance process to demonstrate compliance with
17 section .370. This essentially directed a do over
18 by the city on compliance with section .370.

19 The reasonableness of the board's decision
20 to deny a declaration of invalidity is
21 demonstrated by the exhibits it relied upon when
22 it first concluded that the city had adequately
23 addressed the takings prong of Goal 6,
24 particularly Exhibit 95, the minutes of the city
25 council meeting of January 6, 2009. Those minutes

1 surely show a pro and con discussion of
2 constitutional taking in front of and involving
3 the council. Several speakers, including
4 attorneys representing the petitioners' interests,
5 addressed the issue. Another, Ms. Dickens,
6 representing interests adverse to petitioners
7 specifically addressed salient points in the
8 Attorney General's process.

9 While this evidence is not sufficient to
10 show compliance with section .370, it refutes the
11 contention that the board's decision to deny a
12 requested declaration of invalidity was arbitrary
13 and capricious, or in excess of the board's power,
14 or error of law. Without that declaration of
15 invalidity, the law does not require reenactment
16 of the ordinances.

17 I conclude that petitioners have failed to
18 show any error in the board's approval of the
19 city's compliance process. With due respect, the
20 dissenting board opinion and petitioners' brief
21 described deficiencies in the process that are
22 clearly refuted by the compliance report and
23 accompanying council minutes. In summation on
24 this first broad area of appeal that focuses on
25 the takings prong of Goal 6, I conclude that no

1 error has been shown.

2 The second broad area of appeal focuses on
3 the protection prong of Goal 6 and its relation to
4 the 12 other goals in RCW 36.70A.020. In
5 petitioners' brief at page 3 is contained a
6 summary of board errors. Errors No. 2 and 3
7 relate to this part of the appeal. They are as
8 follows:

9 First, No. 2, that the board misconstrued
10 petitioners' property rights and thus erroneously
11 interpreted and applied the second prong, the
12 protection prong of Goal 6 in the FDO and
13 Reconsideration Order. Next, No. 3, the board
14 ignored uncontroverted evidence in the record of
15 Tumwater's arbitrary and capricious animus in
16 designing, adopting, and approving the ordinances;
17 thus the FDO and Reconsideration Order erroneously
18 found that the protection prong of Goal 6 had not
19 been violated.

20 Following that in the petitioners' brief
21 are listed a statement of seven specific issues,
22 four of which relate to this part of the appeal,
23 Nos. 1 through 4. They are in order: No. 1,
24 whether the act allows creation of a single zone
25 use district for manufactured housing parks;

1 No. 2, whether the ordinances comply with the act
2 when they compel MHP owners to use their land in
3 perpetuity only for MHP uses and create illusory
4 rights to change the MHP use; No. 3, whether the
5 ordinances contained fair and equitable
6 regulations consistent with the act; and No. 4,
7 whether the ordinances are arbitrary and
8 discriminatory under the act.

9 Issue No. 1 is fundamentally different from
10 the other three. Issue No. 1 focuses on the GMA,
11 does it allow a single use zoned district for
12 MHPs. The answer by the board and by this court
13 is "yes." Issues No. 2, 3, and 4 focus on the
14 relationship between the ordinances and the GMA.
15 The review of those issues involves two layers of
16 deference. First is the legislatively imposed
17 deference that the board must exercise when
18 reviewing a city's plan for growth.

19 RCW 36.70A.320(1) provides in relevant
20 part: "In recognition of the broad range of
21 discretion that may be exercised by counties and
22 cities consistent with the requirements of this
23 chapter, the Legislature intends for the board to
24 grant deference to counties and cities in how they
25 plan for growth consistent with the requirements

1 and goals of this chapter."

2 The entire section then concludes with the
3 following note, "The ultimate burden and
4 responsibility for planning, harmonizing the
5 planning goals of this chapter, and implementing a
6 county's or city's future rests with that
7 community."

8 The second layer of deference is imposed on
9 courts by the APA and appellate jurisprudence
10 enforcing and interpreting the APA. The decision
11 of a public agency may be entitled to deference,
12 even substantial deference on interpretations of
13 law when the interpretation involves one or more
14 judicially recognized factors. Among those
15 factors applicable here are:

16 First, where the interpretation depends
17 upon a special expertise inherent in the decision
18 maker. Here the growth management hearing boards
19 were created by the Legislature to enforce and
20 interpret the GMA. The boards may fairly be
21 considered experts at enforcing and interpreting
22 the 13 goals of RCW 36.70A.020.

23 Second, where the interpretation is well
24 established and longstanding; and third, where the
25 Legislature has acted, or failed to act, in a

1 manner that is consistent with the agency's
2 interpretation.

3 In this part of the appeal, petitioners do
4 not ask that the court or the board substitute its
5 judgment for that of the board or the city on the
6 four issues identified to this part of the appeal
7 in petitioners' brief. That appeal could not be
8 successful before either the board or this court.
9 Instead, petitioners contend that in applying and
10 balancing the goals of RCW 36.70A.020, the
11 protection prong of Goal 6 has been ignored or
12 misapplied by the board. Petitioners contend that
13 if the protection prong is applied in a manner
14 intended by the Legislature, the board's decision
15 validating the ordinances cannot stand.

16 The board responded by declaring that the
17 protection prong does not apply to the property
18 rights asserted here by petitioners to have been
19 subject to arbitrary and discriminatory action.
20 This conclusion is before me for review. I
21 conclude that no error has been shown.

22 The protection prong of Goal 6
23 provides, "The property rights of land owners
24 shall be protected from arbitrary and
25 discriminatory actions." The board concluded

1 that these owners, these petitioners, did not
2 claim that a recognized property right was
3 asserted, or more precisely, that the interest
4 affected by the city's arbitrary and
5 discriminatory action in enacting the ordinances
6 was not a property right protected by Goal 6.

7 The rights recognized by the board as
8 applying to the protection prong are those listed
9 as legally recognized rights, statutory,
10 constitutional, and/or court decision rights.
11 This principle was established by the board in its
12 decision in *Anchon v. Clark County* in 1995.

13 "Property rights" is not defined in the
14 statute at issue here. Petitioners contend the
15 phrase should be construed in the manner "property
16 rights" is construed in judicial decisions
17 addressing unconstitutional takings. That is a
18 reasonable interpretation of the phrase.

19 The board interprets the phrase as
20 explained in *Anchon v. Clark County* where the
21 board adopted a narrower construction, approved
22 there to give meaning to the phrase "within the
23 goals of the GMA." In *Anchon*, the board rejected
24 the broader phrase, because in the context of
25 zoning and land use, it would essentially render

1 the factor meaningless and in conflict with long
2 established appellate jurisprudence for zoning and
3 land use. This interpretation is also reasonable.

4 It follows, then, that the phrase is
5 ambiguous. I resolve that ambiguity by adopting
6 the interpretation used by the board. In arriving
7 at that conclusion, I accord deference to the
8 board's interpretation. Relying upon the three
9 factors that I identified earlier, I conclude that
10 the board has expertise in this respect. It was
11 created by the Legislature to just exactly
12 interpret what these goals mean and how they
13 should be applied.

14 Second, the *Anchon* decision is a 1995
15 decision. For the past 15 years, it has remained
16 the same and has been unchallenged. Third, in
17 1997, in enacting RCW 36.70A.320(1), the section I
18 quoted earlier limiting the board's discretion and
19 emphasizing the deference it must give to local
20 decisions, the Legislature had the opportunity to
21 address the board's fairly recent decision, two
22 years earlier, in *Anchon v. Clark County*. It
23 failed to do so. For those reasons, it seems to
24 me that this court is correct in giving deference
25 to the interpretation accorded to the phrase by

1 the board.

2 Further, in conducting an independent
3 review of the reasons listed in the *Anchon*
4 decision for application of the more limited
5 interpretation, I find myself in agreement with
6 that interpretation. It follows, therefore, that
7 the board did not err in failing to declare the
8 ordinances invalid because the protections in
9 Goal 6 were not properly considered.

10 I need and should not go further than that.
11 The arguments concerning the appropriateness of
12 balancing the protection prong of Goal 6 with the
13 other goals listed in section .200 is appropriate
14 only where the protection prong applies. The
15 board concluded that it did not; I conclude that
16 the board was correct; and therefore, without
17 further discussion concerning the balancing of
18 those goals, the decision of the board is
19 affirmed.

20 That will be my decision, ladies and
21 gentlemen. Counsel, the city has prevailed and
22 should prepare and submit an appropriate order
23 consistent with the directions from the
24 Court of Appeals. The decision should not contain
25 findings of fact and conclusions of law. That is

1 the general rule for APA cases, and I believe that
2 it would apply to this review, as well. They are
3 not necessary, because of course, if appeal goes
4 forward, the decision of the board is reviewed,
5 not the decision of this court.

6 Ms. Kirkpatrick, I will assign you the
7 laboring oar here in preparing and submitting an
8 appropriate order. What do you think is a
9 reasonable schedule for accomplishing that? A
10 couple of weeks?

11 MR. MYERS: I would think two weeks,
12 Your Honor.

13 THE COURT: All right. We will schedule
14 this matter for presentation, then, on
15 September 17. It can be moved easily if you don't
16 have it done, and you need not appear if the
17 parties agree on the form of an order to be
18 presented to me.

19 Are there any questions concerning my
20 decision here?

21 MR. MISSALL: None from the
22 petitioners, Your Honor. Thank you.

23 MS. DRUMMOND: No. Thank you, Your
24 Honor.

25 THE COURT: All right. Then we'll stand

1 in recess, ladies and gentlemen. Thank you.

2 MS. DRUMMOND: Thank you, Your Honor.

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4 (Conclusion of September 7, 2010, Proceedings.)
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